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the Limitation Act) under certain circumstances, if in his discretion he thinks fit to do so, to admit a second appeal. Section 34 empowers him, in certain cases, to send for the record of a case and deal with it in his discretion. To apply Art. 156 to such cases would be to use it, not to restrict any rights given to the parties, but to curtail a discretion given to the Court. And this was the ground of decision. Moreover, the procedure under those sections is quite foreign to the Civil Procedure Code.

T. A. P. *Appeal dismissed,*

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

SEW BUX BOGLA *v.* SHIB CHUNDER SEN AND ANOTHER.

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Civil Procedure Code (Act XIV of 1882), *ss.* 295, 622—*Rateable distribution —Material irregularity affecting the merits of the case.*

The words of s. 295 of the Code of Civil Procedure, "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors.

The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code.

The words "a material irregularity" in s. 622 of the Code of Civil Procedure, include an irregularity of procedure materially affecting the merits of the case.

An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section. *Magni Ram* v. *Jiwa Lal* (1) observed on.

THIS was a rule calling upon one Bhugwan Doss to show cause why an order of the Officiating Chief Judge of the Small Cause Court should not be set aside under s. 622 of the Code of Civil Procedure.

The facts of the case were as follows:—

On the 23rd June 1885 one Sew Bux Bogla obtained a decree for Rs. 1,397-11, in the Calcutta Court of Small Causes, against Shib Chunder Sen and Hurry Narain Sen, which directed payment to be made by monthly instalments of Rs. 50.

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In execution of this decree certain property of the judgment-debtors was attached on the 7th January 1886.

On the 31st August 1885 one Bhugwan Doss obtained a decree against the same defendants for the sum of Rs. 1,241-14-3 payable in monthly instalments of Rs. 100.

On the 8th January 1886, Bhugwan Doss applied for attachment of the defendants' property; on that date a warrant was issued, but the property was never actually attached.

Some time between the 8th and 15th January 1886 the defendants filed their petition of insolvency, and the usual vesting order was made.

The Official Assignee then paid into the Court of Small Causes the amount of the decree obtained by Sew Bux, and the property was released from attachment.

Bhugwan Doss then applied to the Court under s. 295 of the Code of Civil Procedure for a share in the money so paid into Court, and his claim was allowed by the Judges of the Small Cause Court.

On this the rule above mentioned was granted by the High Court to Sew Bux Bogla.

Mr. *Bonnerjee*, in showing cause, contended that there was nothing to show that the Judges of the Small Cause Court had acted without jurisdiction or had exercised a jurisdiction not vested in them, and that under s. 622 these were the only grounds on which the Court would interfere; that illegality did not mean a mistake in law, and cited *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), and *Magni Ram* v *Jiwa Lal* (2).

Mr. *O'Kinealy*, in support of the rule, contended that the money could not be said to have been realized "by sale or otherwise in execution;" the payment was a voluntary one made by the Official Assignee, and on the construction of s. 295 cited *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi* (3). With reference to the powers of interference by the Court under s. 622, he contended that there had been a material irregularity affecting the merits, inasmuch as the Judges had proceeded under a section which did not apply, and

(1) I. L. R., 11 Calc, 6. (2) I. L. R., 7 All., 336.
(3) I. L. R., 6 Bom., 588.

that this would enable the Court to interfere, citing *Tiruchittambala Chetti* v. *Seshayyangar* (1); *Badami Kuar* v. *Dinu Rai* (2), and *Maulvi Mahammad* v. *Syed Husain* (3).

TREVELYAN, J.—This application raises a question of some importance. It is an application to the Court under the revision section (s. 622) of the Civil Procedure Code to set aside an order made by the Small Cause Court. I have taken some time to consider this case, not because I have entertained any doubt, but because I thought it desirable to hesitate before interfering with the considered judgment of two able and experienced Judges of the Small Cause Court. I have no doubt whatever that the Judges of the Small Cause Court were wrong.

The only question is whether, considering a recent ruling of the Privy Council, and the interpretation which has been given to that ruling by a Full Bench of the High Court of the North-Western Provinces, I have power to interfere. The facts are as follows: On the 23rd of June 1885 Sew Bux Bogla obtained a decree in the Calcutta Small Cause Court against Shib Chunder Sen and Hurry Narain Sen for Rs 1,397-11, to be paid by instalments of Rs. 50 a month.

On the 7th of January 1886 certain property of these defendants was attached in execution of this decree. In considering this case it occurred to me that there might be a question as to whether this attachment was valid, as the decree provides for payment by instalments, and was silent as to execution going for the whole amount in case of the failure to pay any instalments. I do not think, however, that I need consider this question, as the validity of rule 34 of the rules of the Small Cause Court has not been impugned by Mr. Bonnerjee. On the 31st of August 1885 Bhugwan Doss Bogla obtained a decree against Shib Chunder Sen and Hurry Narain Sen for the sum of Rs. 1,241-14-3 to be paid by instalments of Rs. 100 a month.

On the 8th of January 1886 Bhugwan Doss applied for attachment of the defendants' property, and on the same date a warrant of attachment was issued, but the property was not attached. On some day between the 8th and the 15th of

(1) I. L. R., 4 Mad., 383. (2) I. L. R., 8 All., 111.
(3) I. L. R., 3 All., 203.

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January 1886 the defendants filed their petition in the Insolvent Court and the usual vesting order was made.

The result of this was that the Official Assignee obtained a title to the property attached, subject only to Sew Bux Bogla's attachment. To get rid of this attachment the Official Assignee, on the 15th of January 1886, paid into Court the amount of Sew Bux Bogla's decree, and the property was accordingly released.

Bhugwan Doss applied for a share of this money under s. 295 of the Civil Procedure Code, and his claim has been allowed by the Small Cause Court.

Section 295 is as follows: "Whenever assets are realised by sale or otherwise in execution of a decree, and more persons than one have, prior to the realisation, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons." In this case I think that no assets have been realised by "sale or otherwise in execution of a decree."

These words, I think, provide only for the case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors.

The section does not compel a judgment-creditor whose debt is satisfied by the judgment-debtor or, as in this case, by a person standing in the shoes of the judgment-debtor, to share with other persons the money received by him in satisfaction of his judgment. The construction put upon the section would prevent a judgment-creditor from coming to an arrangement with his debtor. If the property attached in this case were more than sufficient to pay off both decrees, the attaching creditor, although he has a preferential title to the Official Assignee, would be deprived of his rights by the money being paid into Court.

This result was, I am sure, never contemplated by this section.

It would in reality take away from a creditor the benefit which an attachment gives him against the Official Assignee.

This section was considered by a Bench of the Bombay High Court in the case of *Pursholamdass Tribhovandass* v.

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Mahanant Surajbharthi Haribarthi (1). In that case a judgment-creditor executed his decree by arrest. The debtor, on being arrested, paid the amount of the decree, and was discharged. Another judgment-creditor, who had applied for execution of his decree, claimed to be entitled to a share of the money paid by the judgment-debtor.

It was held that this money was not realised by sale or otherwise in execution of a decree, and that "realised" in s. 295 means realised from the property of the judgment-debtor. I do not think that in this case the money was realised out of the property of the judgment-debtor. Suppose that a friend of the judgment-debtor had paid off the decree for him, it is clear that it could not in that case be said that the money was realised out of the property of the judgment-debtor. It surely makes no difference that the money was paid by the Official Assignee. The Bombay High Court points out that the view they take is confirmed by s. 341, cl. (*b*), which provides for the discharge of the judgment-debtor from arrest, "at the request of the person on whose application he has been imprisoned," so, as they say, this seems to assume that the arresting creditor may avail himself of the arrest to enter into any arrangement he thinks proper with the debtor behind the back and independently of other creditors who may have applied for execution. In this case also the attachment would be removed, and the Official Assignee would acquire the property directly the decree is paid off, or an arrangement be come to between him and the attaching creditor.

I think that "by sale or otherwise" means by sale or by other process of execution provided for in the Civil Procedure Code. If the Small Cause Court Judges were right in their construction of the section, the following might occur: A debtor might pay off an attaching creditor who would have to divide the money with other creditors who had applied for execution, and then these other creditors might by attachment or otherwise realise the whole of their money, whereas the first attaching creditor only receives a portion, and could not receive more out of the property of the judgment-debtor, as the judgment-debtor had paid off his debt. The judgment of the Small Cause Court being in my

(1) I. L. R., 6 Bom., 583.

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opinion wrong, the question is whether I can interfere with its order under s. 622 of the Civil Procedure Code.

I can only do so if I think that the Small Cause Court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

This section has been recently considered by the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1). All that case really decides is that s. 622 does not give a right of appeal on questions of law, and that in case where the Subordinate Court has jurisdiction, the superior Court can only interfere where that Court has acted illegally and with material irregularity in the exercise of such jurisdiction.

A Full Bench of the Allahabad High Court in the case of *Magni Ram* v. *Jiwa Lal* (2), held that the Privy Council decided, in the case I have referred to, that only questions relating to the jurisdiction of the Court can be entertained under s. 622. I think that the Privy Council did not only include in s. 622 questions relating to the jurisdiction of the Court, but also questions relating to the *exercise* of the jurisdiction of the Court. The Allahabad Court leaves out of consideration the words "or to have acted in the exercise of its jurisdiction illegally or with material irregularity," words to which the Privy Council distinctly gives effect. Can I in this case say that the Small Cause Court, to use the words of the Privy Council and of the section, exercised their jurisdiction "illegally or with material irregularity"? It is not easy always to draw a clear line between an illegal exercise of jurisdiction and a mistake of law. If A sued B for some property, and the Court gave a decree to C who was not a party to the suit, this would come clearly under this section. The adoption of a procedure different from that provided by law and such as to cause material injury to the suitor could, I think, be dealt with by s. 622. The application of a section of the Code to a case to which it does not apply stands, I think, upon the same footing.

(1) L. R., 11 I. A., 237; I. L. R., 11 Calc. 6. (2) I. L. R., 7 All., 336.

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This is what has been done in the present case. It seems to me that, as held by Mr. Justice Straight and Mr. Justice Turrel, in *Badami Kuar* v. *Dinu Rai* (1), a material irregularity includes an irregularity of procedure materially affecting the merits of the case. The illustration which Mr. Justice Straight gives, namely, the seizure of the costs of a judgment-debtor, in some respects has a resemblance to the present case. I think that the decision of the Small Cause Court must be set aside with costs.

Attorney for Sew Bux Bogla: Baboo *N. C. Bose.*

Attorney for Bhugwan Doss: Mr. *Hart.*

T. A. P. *Rule absolute.*

APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Porter.

1886
June 24.

FAZEL BISWAS AND OTHERS (PLAINTIFFS) *v.* JAMADAR SHEIK AND OTHERS (DEFENDANTS.)*

Review—Civil Procedure Code, 1882, *s.* 624—*Application for review heard by successor to Judge who passed the decree.*

Where an application for review is presented to the Judge who made the decree, and he thereupon issues notice to the other side, the application is "made" to him within the meaning of s. 624 of the Civil Procedure Code, and may be heard and disposed of by his successor in office. *Karoo Sing* v. *Deo Narain Sing* (2) followed.

THIS case was originally heard by the Munsiff of Jessore who gave a decree in favor of the plaintiffs, and an appeal by the defendants from that decree to the Subordinate Judge was dismissed. The Subordinate Judge afterwards admitted an application for review of his judgment, and directed the application to be registered, and the fees for service of notice to be deposited within three days. The Subordinate Judge left before the review was heard, and it was taken up and heard by his successor, who reversed the decree, and in lieu thereof made a decree dismissing the suit. From this decision the plaintiffs appealed.

* Appeal from Appellate Decree No. 183 of 1886, against the decree of Baboo Promotho Nath Banerji, Subordinate Judge of Jessore, dated the 29th of September 1885, reversing the decree of Baboo Jodu Nath Ghose, Munsiff of Jessore, dated the 15th of December 1884.

(1) I. L. R., 8 All., 111. (2) I. L. R., 10 Calc., 80.